IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.1236 of 1993

1. J.Syed Ahmed Basha
2. J.Syed Jawad Hussian .. Appellants

-Vs-

Mumtaj .. Respondent

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree in A.S.No.36 of 1991 on the file of the Sub Court, Vridhachalam dated 26.8.93 reversing the judgment and decree in O.S.No.778 of 1986 on the file of the Principal District Munsif Court, Kallakuruchy dated 4.1.1991.

!For Appellants : Mr.S.V.Jayaraman
Senior Counsel
for Mr.K.Muthukumarasamy

^For Respondent : Mr.S.D.Balaji

:JUDGMENT

What is challenged herein is the judgment of the learned Subordinate Judge, Vridhachalam, made in A.S.No.36/91 wherein the judgment of dismissal by the trial Court in a suit for permanent injunction was reversed, and the suit was decreed.

2. Necessary facts for the disposal of this second appeal are as follows:

The suit property, which was originally a vacant site, was purchased by one Syed Haider Sahib, the husband of the plaintiff, from out of his money on 6.3.1973 by a registered sale deed. The vendee under the document was directed to pay the mortgage amount under a mortgage, the pre-existing one, made by the vendor. After the purchase, the patta was transferred to the name of the husband of the plaintiff. The husband of the plaintiff executed a hippa namely a gift deed in favour of his wife, the plaintiff herein and subsequent to the same, the plaintiff raised constructions and paid taxes. The tenancy agreement was also made, and the plaintiff has been receiving the rental also. Thus, the plaintiff has been in continuous possession of the property as the owner of the same. While so, there was an attempted interference by the defendants stating that they have got title to the property. Hence, the suit.

3. The suit was resisted by the defendants stating that the plaintiff's husband was not the exclusive owner of the property; that when the property was purchased, they also made contributions according to their share namely 2/3rd; that apart from that, even at the time of the constructions also, they have contributed; that even assuming that a document was executed by the plaintiff's husband in favour of the plaintiff namely a gift deed, it was not valid; that even all the tenants, who are occupying the property, have entered into an agreement with the defendants only and neither with the plaintiff nor with her husband, and thus, the plaintiff was not entitled to the relief, since she was not the owner of the property; that the plaintiff was entitled to 1/3rd in the property and not the entire property, and hence, the suit was to be dismissed.

4. The trial Court framed the issues, tried the suit and dismissed the same. The aggrieved plaintiff took it on appeal, wherein the learned Subordinate Judge reversed the judgment of the trial Court and decreed the suit. Hence, the defendants have brought forth this second appeal.

5. At the time of admission, the following substantial questions of law were formulated by this Court:

(1) Whether the lower appellate Court is correct in deciding the title of the plaintiff with respect to suit property in the absence of any prayer or issue to that effect?

(2) Whether the finding of the lower appellate Court regarding possession is sustainable in law inasmuch as such a finding is not based on evidence at all?

6. This Court heard the learned Counsel for the appellants and also the learned Counsel for the respondent on those contentions, paid its full attention on the same and had a thorough scrutiny of the available materials. This Court is of the considered opinion that the judgment of the first appellate Court has got to be set aside with a remittal order.

7. As pointed out above, it was a suit for bare injunction. The Court fee has also been paid under Sec.27(c) of the Court Fees Act. The plaintiff's case was that pursuant to a hippa namely a gift deed, executed in her favour by her husband, who was the previous owner of the property, she got the property, raised constructions and rented out the same to the third parties, who are also occupying the property; that she has been paying the tax, and the attempted interference by the defendants compelled her to file the suit for permanent injunction. What was all contended by the defendants' side was that neither the plaintiff's husband nor the plaintiff was the sole owner of the property; that the defendants were entitled to 2/3rds in view of their contributions made at the time of purchase and subsequently at the time of constructions raised therein; and that even assuming that the hippa alleged to have been executed in favour of the plaintiff was true and genuine, she was entitled only to 1/3rd, while the defendants were entitled to 2/3rd. Thus, there were rival claims as to the title over the property. In order to prove their respective cause, both the parties came forward to adduce evidence that they were in possession of the property, and all the tenants were actually under the lease agreement entered with the respective parties. It is pertinent to point out that number of documents were also placed by the defendants' side. But, both the Courts below have forgotten a while that it was a suit for bare injunction and not one for declaration of the title of the parties. The first appellate Court in extenso has discussed the evidence as to the title of the parties and the rival submissions also, which was not

expected of. In such circumstances, without any hesitation whatsoever, the judgment of the first appellate Court has got to be set aside, for the simple reason that it was a suit for bare injunction and not for declaration, and the court fee has also been paid under Sec.27(c), and the necessary issues were also not framed as to the declaration. This Court is of the considered opinion that it is a fit case, where the matter has got to be remitted back to the trial Court with a direction to give an opportunity to the plaintiff to include the prayer for declaration in respect of the property, receive the necessary court fee, give an opportunity to the defendants for filing additional written statement, frame the necessary issues and dispose of the same in accordance with law, and the interest of justice would also require the same. Since the suit was filed in the year 1986 and till the time of disposal of this second appeal, the matter was pending for nearly about 17 years, the Court is of the considered view that the matter has got to be adjudicated within a time frame.

8. In the result, this second appeal is allowed, setting aside the judgment and decree of the first appellate Court and remitting the matter back to the trial Court with a direction to afford an opportunity to the plaintiff to include the prayer for declaration in respect of the property, receive the court fee in accordance with law, give an opportunity to the defendants for filing additional written statement, frame necessary issues, afford an opportunity to both sides to adduce additional evidence and dispose of the matter within a period of three months from the date of receipt of copy of this judgment. No costs.

Index: yes
Internet: yes

To:
1. The Subordinate Judge
Vridhachalam
2. The Principal District Munsif
Kallakurichi
3. The Record Keeper
V.R. Section
High Court, Madras.

nsv/

□